89-1868

No. 90 - 1868

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

John Callen,

Respondent,

v.

OULO O/Y and OY Finnlines, Ltd.,

Petitioners.

On Writ of Certiorari
to the United States Court of
Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

AND SUPPLEMENTAL APPENDIX

Charles Sovel
Freedman and Lorry, P.C.
800 Lafayette Building
5th and Chestnut Sts.
Philadelphia, PA 19106
(215) 925 - 8400
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 90 - 1868

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

John Callen,

Respondent,

v.

OULO O/Y and OY Finnlines, Ltd.,

Petitioners.

On Writ of Certiorari
to the United States Court of
Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, John Callen, respectfully requests that the Court deny the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit in the within case for the following reasons:

OPINIONS BELOW

The decision of the United States District Court for the Eastern District of Pennsylvania is officially reported at 711 F. Supp. 244 (E.D. Pa. 1989). The judgment of the United States Court of Appeals for the Third Circuit affirming the lower court decision is officially reported at 897 F.2d 520 (3rd Cir. 1990). The remaining references to the opinions below in the petition are correct.

STATEMENT OF THE CASE

Respondent, a longshoreman who was discharging cargo from petitioners' ship, was injured when he stepped into what was, in effect, a concealed hole in the ship's 'tween deck. The trial judge, sitting as the trier of fact in a non-jury trial, concluded (1) that the presence of concealed holes in a busy workplace constituted a hazardous condition, (2) that reliance on warnings to the longshoremen of the presence of these concealed holes to protect them from injury "constituted poor judgment," and (3) that reasonable care under the circumstances mandated that "[A]ctual neutralization of the hazard (created by the concealed holes) was necessary" (Conclusion of Law No. 7 (9a-10a)).

The hole into which respondent stepped actually was a rung of a ladder which was built into the ship's 'tween deck.[1] The design of the ship's 'tween deck was such that, when the 'tween deck was opened to permit access to the lower hold, the entire 'tween deck folded to an upright position, much like the effect of squeezing an accordion. Half the 'tween deck folded forward against the forward bulkhead of the hold and half folded backward against the after bulkhead. When this was done, the

---

1. Each hold of the ship had two deck levels, a 'tween (or between) deck and a lower hold. As described in the text, each 'tween deck folded open to permit access to the lower hold.

open, and now upright, sections of the 'tween deck blocked the escape hatch ladders located on the forward and after bulkheads of the hold. As a result, it was necessary to provide additional ladders which would be accessible when the 'tween deck was opened, and this was accomplished by building ladder rungs into a portion of the 'tween deck which, when the 'tween deck was opened, would coincide with the escape hatch ladders which were blocked (See Finding of Fact No. 5 (2a)).

These ladder rungs were 40 cm. long (approximately 16 inches), 10 cm. wide (approximately 4 inches) and 10 cm. deep (Finding of Fact No. 6 (2a)). Sixteen of these rungs were built into the 'tween deck next to each other but spaced so that, when the deck was open and in an upright position, they formed a ladder. However, when the 'tween deck was closed and in the horizontal position, these "rungs" were simply holes in the deck.[2]

The holes forming the ladder rungs were recessed from the rest of the 'tween deck thereby permitting a flush cover or plate to be placed over them when the 'tween deck was closed. There was evidence that such covers or plates had been used on prior occasions (See Finding of Fact No. 6 (2a-3a)). However, no such covers or plates were in use at the time respondent was injured. Had they been used there would have been no hole in the deck for respondent to step into.

At the time of the accident, the longshoremen were discharging a cargo of rolls of paper. These rolls of paper had been loaded in Finnland. At the time the rolls of paper were loaded, a heavy cardboard-like paper was put down on the 'tween deck to protect the cargo from dirt and moisture on the deck. This cardboard-like paper covered the ladder rung holes, conceal-

---

2. Counsel for petitioners, in an excess of poetic license, refers to these holes as "notches". In no sense were they notches. The trial judge found them to be "holes" (Finding of Fact No. 6 (2a)), and their measurements show they were both large enough and deep enough to permit a man's foot to sink into them.

ing them from view (Findings of Fact Nos. 9 and 10 (3a)). The ship's officers observed both the loading and unloading of the cargo and knew the ladder rung holes were concealed by the cardboard-like paper that had been put down on the 'tween deck (Findings of Fact Nos. 8 and 10 (3a), Conclusion of Law No. 6 (9a)).

The method of discharge used by the discharging longshoremen involved the use of a device know as a Jensen rig. A Jensen rig is a cage-like device which is lowered over several rolls of paper by the ship's crane and closed by pulling four lanyards (Finding of Fact No. 4 (2a)). The method of discharge also involved the use of a fork lift truck equipped with a paper clamp which would pick up the rolls of paper and move them into position where they could be picked up by the Jensen rig.

Respondent was working in the ship's hold. His job was to help guide the Jensen rig into position over the rolls of paper as it was lowered into the hold, and then to assist in tightening the lanyards (Finding of Fact No. 4 (2a)). In this operation respondent had to look upwards at the Jensen rig as it was being lowered into position over the rolls of paper while, at the same time, keeping an eye out for the fork lift truck which was constantly moving about him. Respondent was injured in the course of this operation when, while stepping backward while tightening a lanyard, his right foot went through the paper on the deck into one of the concealed ladder rung holes, causing him to fall and suffer the injuries for which this suit was brought (Finding of Fact No. 12 (4a)).

Respondent's foreman, a Joseph Micofsky, was aware of the ladder rung holes from having previously worked on the ship. When asked what he did on those prior occasions to protect his men from injury from stepping into these holes, Micofsky testified that he simply told his men to watch out for the holes. However, even with this warning, the men still tripped over the holes (2b-3b). On the day of the accident, respondent was a "pick-up" in the Micofsky gang, and never having worked on the ship before, was neither warned nor was aware of the concealed

ladder rung holes (Finding of Fact No. 6 (3a)).

On the basis of the foregoing evidence, the trial judge found that, since the concealed ladder rung holes were located in "a busy workplace", giving warning of their presence was not an adequate measure to protect the longshoremen from injury; instead, "actual neutralization" of this hazard was necessary, and the vessel, which knew of the condition, and knew that the stevedore was not taking measures to protect the longshoremen from this "hidden shipboard defect", had a duty to intervene and require that appropriate protective measures be taken (Conclusion of Law No. 7 (9a-10a)). The trial judge concluded that "[T]he vessel's failure to take such action constituted negligence" (Conclusion of Law No. 7 (10a)).

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither the decision below nor the record raises the Question Presented in the petition.

The petition is predicated on a misstatement of the decision below. The trial judge did *not* find that the vessel was negligent because of any failure to give warning of the concealed ladder rung holes to the individual longshoremen, nor did the trial judge base his finding of negligence on the vessel's failure to intervene in the stevedoring operations in order to give such a warning. Rather, the trial judge found that simply giving warning of the presence of the concealed holes in the deck was not an adequate measure to protect the longshoremen from injury, and that, instead, "actual neutralization" of this hazard was necessary (10a). The vessel's negligence was not the failure to give warning of the hazard, but, rather, the failure to intervene in the stevedoring operations in order to require the "actual neutralization" of the hazardous condition. Thus, the trial judge concluded (Conclusion of Law No. 7 (10a)):

> . . . The vessel, from the inception of the voyage, knew that the ladder rungs were concealed by thick

> paper and knew, or should have known, that such a concealed condition posed an unreasonable risk of harm to the longshoremen working on board. *That knowledge, plus awareness of the stevedore's improvident conduct, should have prompted the vessel to intervene and to take measures that would have prevented harm to the longshoremen from this hidden shipboard defect.* Failing this, it should have instructed the stevedore to stop work. *The vessel's failure to take such action constituted negligence.* (Emphasis supplied)

The petition also misstates this Court's holding in *Scindia Steam Navigation Co., Ltd.*, 451 U.S. 156 (1981). The petition cites *Scindia* as standing for the proposition that the vessel's duty of care is limited to simply giving warning to the stevedore of unsafe conditions of which the vessel knows or has reason to know (see petition at pp.8-9). This is not a correct statement of this Court's holding in *Scindia*.

In *Scindia*, the shipowner *argued* that its duty of care should be limited to merely giving warning of an unsafe condition to the longshoreman's stevedore employer, see 451 U.S. at 172-173. This Court rejected this limitation,[3] and instead held that a shipowner would have a duty to intervene in stevedoring operations if it knew that the stevedore was acting improvidently in continuing to use ship's equipment which was in an unsafe condition. Thus, this Court stated in *Scindia*, 451 U.S. at 175-176:

---

3. The excerpt from the *Scindia* decision quoted at pages 8-9 of the petition is *not* a statement of the Court's holding, but rather a statement of what the shipowner in *Scindia* "conceded" the shipowner's duty of care to be. This Court, in Section IV of the *Scindia* opinion, subequently rejected the contention that a shipowner's duty of care was limited to simply giving warning of an unsafe condition, and instead held that a shipowner would have a duty to intervene in stevedoring operations if the circumstances were such that the shipowner knew or had reason to know that the stevedore was acting "improvidently" in failing to remedy an unsafe condition, see *Scindia*, 451 U.S. at 175-176.

> Yet it is quite possible, it seems to us, that Seattle's (the stevedore) judgment in the respect was so obviously improvident that Scindia, if it knew of the defect and that Seattle was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch. The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of its condition.

The instant case involved a hazardous condition of the vessel's deck of which the shipowner had *actual* knowledge. The shipowner also had *actual* knowledge that the stevedore was not taking action to remedy this hazardous condition. The trial judge found that the nature of the hazardous condition was such that simply warning of the unsafe condition was not sufficient, and that "actual neutralization" of the hazard was necessary (Conclusion of Law No. 7 (9a-10a)). This finding was amply supported by the evidence and in no sense could it be considered to be "clearly erroneous."[4] Since the trial judge's finding of negligence was not predicated on a failure to give warning, the issue raised by the Question Presented in the petition and the arguments made in the petition simply are not presented by the decision below or by the record in this case. Accordingly, for this reason alone, the petition should be denied.

In addition, the trial judge properly applied the principles set forth in the *Scindia* decision, and his findings of fact do not raise any issues which go beyond the facts of this particular case, or present any issues of importance which would warrant further review by this Court.

---

4. There is no contention by petitioner that any of the trial judge's findings are not supported by the evidence or are "clearly erroneous."

2. The decision below is not in conflict with the Ninth Circuit's decision in *Bjaranson v. Botelho Shipping Corp.*, 873 F.2d 1204, 1989 A.M.C. 381 (9th Cir. 1988).

Petitioners' citation of *Bjaranson v. Botelho Shipping Corp.*, 873 F.2d 1204, 1989 A.M.C. 381 (9th Cir. 1988), as being in conflict with the decision below is without merit. The *Bjaranson* decision is factually distinguishable from the instant case, and was decided on an entirely different legal basis.

Bjaranson involved an injury to a longshoreman caused by a fall from a ladder. The longshoreman's claim of negligence was that the ladder was unsafe because it lacked adequate hand holds. The Ninth Circuit held that the danger created by the absence of the hand holds easily could have been avoided by the longshoremen, and, therefore, the evidence did not establish the existence of a condition which created an *unreasonable* risk of harm to longshoremen, see 873 F.2d at 1208. On this basis, the Ninth Circuit reversed the trial court, and granted judgment n.o.v. in favor of the shipowner. The decision in *Bjaranson* then went on to note, in what clearly was *dicta*, that the condition of the ladder was open and obvious and that "the fact that the condition was obvious to his (the longshoreman's) employer eliminated *whatever* duty there may have been upon Botelho to warn the individual employees", see 873 F.2d at 1209 (Emphasis supplied).

The Ninth Circuit's decision in *Bjaranson* does not hold that the shipowner's duty is limited to the giving of warning to the stevedore of a hazardous condition, nor does it hold that *in all cases* the duty to warn is fulfilled simply by giving warning to the longshoreman's stevedore employer. Rather, the Ninth Circuit simply stated that in those circumstances where a hazardous condition is open and obvious to the employer, there is no need to give a seperate warning of the hazard to the individual longshoremen.

In the instant case, the hazardous condition created by the concealed ladder rung holes was *not* open and obvious. More

importantly, the trial judge in the instant case found that simply giving warning of the hazard was *not* sufficient to protect the longshoremen from injury, and that "actual neutralization" of this hazard was necessary (Conclusion of Law No. 7 (9a-10a)). Consequently, the issue raised in *Bjaranson* as to whether it is necessary to give warning of a hazard to the individual longshoremen, as distinguished from just giving warning to their stevedore employer, is not involved in the instant case. Accordingly, there is nothing in the *Bjaranson* decision which is in conflict with the decision in the instant case.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition should be denied.

Respectfully submitted,

Charles Sovel
Freedman and Lorry, P.C.
800 Lafayette Building
5th and Chestnut Sts.
Philadelphia, PA 19106
(215) 925 - 8400
Attorneys for Respondent

SUPPLEMENTAL APPENDIX

Excerpt from Court of Appeals Appendix - 138a

MR. BERRY: That's all I have. Thank you.

CROSS EXAMINATION

BY MR. SOVEL:

Q Mr. Micofsky, in the years that these ships have been coming in, did you ever observe the existence of covers that went over those ladder rungs in the holds?

A Yes.

Q Would you tell - - what about them?

A There - - they were - - I guess, they look like aluminum plate, maybe four or five pieces that covered the ladder - -

MR. BERRY: Your Honor - -

THE WITNESS: And when we're done discharging - -

MR. BERRY: Your Honor - -

THE WITNESS: When we're done discharging - -

MR. SOVEL: Hold it.

MR. BERRY: Your Honor, I'd like to object that its beyond the scope of direct.

THE COURT: Objection's overruled.

BY MR. SOVEL:

Q When would you observe the covers and how would you observe them?

Q See when the ship - - the hatch was done, the four or five plate - - the crew used to come down and unscrew 'em and take 'em and put 'em somewhere.

Excerpt from Court of Appeals Appendix - 139a

Micofsky, J. - cross/Sovel

Q And then, did that stop?
A Yes, it did stop.
Q Now, after they stopped having those covers on it, did you still have situations where men tripped over the rungs?
A Yes.
Q Even though they knew about them?
A Yes.

MR. SOVEL: Thank you.

REDIRECT EXAMINATION

BY MR. BERRY:
Q Mr. Micofsky, am I correct, it's been about 10 or 15 years since those covers have been there?
A Well, I don't know how long the ships been comin' into the port.
Q It's bee about 10 or 15 years since you've seen those covers on top of the ladders?
A It's a Finnline. I don't know how long them ships been comin' in.
Q My question isn't how - - Mr. Micofsky, my question is not how long the ships been coming in. The question is when is the last time you saw a cover on one of those ladders? And it's been about 10 to 15 years, is that a fair statement?
A Yeah, it's been a long time.
Q Pardon me?

Excerpt from Court of Appeals Appendix - 140a

Micofsky, J. - redirect/Berry

A It's been a long time.
Q Approximately ten years?
A Guess so. I don't know.
Q Okay. And in the - - in the last five years before December 30, 1986, you've never seen a cover on those ladders, is - - am I right?
A No.
Q My - - the way I phrased that question, your answer's not clear.
It is correct that you've never seen a cover in the last five years on those ladders, correct?
A No, I never seen a cover on the ladders?
Q Okay. And I'm not clear on Mr. Sovel's last answer. But men have tripped on these covers in the last five or six years?
A Yes.
Q So that you knew that men were tripping on the ladders.
A Yes.
Q Correct?
A Yes.
Q And what effort did you make to tell the longshoremen in your gang to watch out for the ladders that were there?
A They watch out, that's all. Don't slip. Don't fall in the holes.
Q And you told that to your regular members at some point